

Discrimination in the Workplace: Facts and Guidance

- An overview of the anti-discrimination statutes enforced by the EEOC
- An introduction to the theories under which claims of discrimination are brought

Title VII of the Civil Rights Act of 1964 (Title VII)

- Protects employees and applicants for employment from discrimination based on:
 - Race
 - Color
 - National Origin
 - Gender
 - Religion

Age Discrimination in Employment Act of 1967 (ADEA)

- Protects employees and applicants for employment from discrimination based on age
- To be covered, individual must be 40 years of age or older

Rehabilitation Act of 1973

- Protects federal employees and applicants for federal employment from discrimination based on disability
- In 1992, the Rehabilitation Act was amended to apply the EEO provisions set forth in the Americans with Disabilities Act of 1990

Equal Pay Act of 1963

- Act requires that men and women be given equal work in the same establishment
- Positions need not be identical, but must be substantially equal

Retaliation

- An employee or applicant may allege that she has been retaliated against because she engaged in protected EEO activity under one of the aforementioned statutes
 - Opposition – Implicit or explicit communication to the employer a belief that its activity constitutes a form of discrimination
 - Participation – Individual has filed a complaint, testified, or participated in an investigation, proceeding, hearing, or litigation under the aforementioned anti-discrimination statutes

Theories of Discrimination

Disparate Treatment

An intentional act taken against an individual based on her membership in a group protected by Title VII, the ADEA, or the Rehabilitation Act/ADA or in retaliation for engaging in EEO activity under one of those statutes.

Disparate Treatment – Circumstantial Evidence

- Three-part test set forth in *McDonnell Corp. v. Green* (1973)

1. *Prima facie* case:

- Adverse Action
- Circumstances that support an inference of discrimination/retaliation

2. Legitimate, Nondiscriminatory Reason

- Employer has the burden of rebutting the *prima facie* case by articulating a legitimate, nondiscriminatory reason(s) for the action alleged to be discriminatory and/or retaliatory
- Employer merely has to articulate such a reason(s), not prove that it was the actual reason

3. Pretext

- Burden shifts back to the complainant to establish that the articulated reason(s) is not credible
 - The articulated reason is factually incorrect
 - The reason, although factually correct, is not the true reason for the challenged action(s)
 - Other evidence to suggest that the action was discriminatorily motivated

Disparate Treatment – Direct Evidence

- “Direct evidence” is an action or statement that reflects a discriminatory and/or retaliatory attitude and which correlates to the challenged act
- When a complainant presents “direct evidence,” a finding of liability is automatically made against the employer
- Employer can mitigate damages by demonstrating that it would have taken the same action even absent the discriminatory consideration(s)

Theories of Discrimination - Harassment

- Unwelcome verbal or physical conduct based on one or more of an individual's protected bases under Title VII, the ADEA, or the Rehabilitation Act/ADA or on protected EEO activity under those statutes

Establishing Harassment

- Complainant must demonstrate:
 - She was subjected to unwelcome conduct based on her membership in one or more of the protected groups or based on her EEO activity
 - The harassment was sufficiently severe and pervasive to alter the conditions of her employment and create an abusive working environment
 - Employer liability

Employer Liability – Harasser is Co-Worker

- Employer is liable if it knew or should have known about the harassment and failed to take immediate and appropriate corrective action

Employer Liability – Harasser in Complainant's Supervisory Chain

- If harassment resulted in a tangible employment action, employer is automatically liable
- If harassment did not result in a tangible employment action, employer must meet two-part defense to avoid liability:
 - It exercised reasonable care to prevent and correct promptly any harassment, and
 - The complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise

Theories of Discrimination – Reasonable Accommodation

- Under the Rehabilitation Act/ADA, an employer is required to provide a reasonable accommodation(s) for the known physical or mental limitations of a “qualified individual with a disability” unless to do so would cause an undue hardship.
- A reasonable accommodation is any change in the work environment or in the way things are customarily done that would enable an individual to enjoy equal employment opportunities.

“Individual With a Disability”

- Individual has a physical or mental impairment that substantially limits one or more of that person’s major life activities; or
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

“Qualified Individual With a Disability”

- An “individual with a disability” who:
 - Satisfies the requisite skill, experience, education, and other job-related requirements of the position; and,
 - Can perform the essential functions of the position with or without a reasonable accommodation(s)

Reasonable Accommodation

- Encompasses three aspects of the employment relationship:
 - Application process;
 - Job performance;
 - Benefits and privileges.

Examples of Accommodations

- Making facilities accessible
- Job restructuring
- Part-time or modified work schedules
- Acquiring or modifying equipment
- Providing interpreters
- Reassignment to a vacant position

Undue Hardship

- Employer can avoid providing an accommodation if it demonstrates undue hardship
 - General conclusions are not sufficient to demonstrate undue hardship
 - Showing must be based on an individualized assessment of current circumstances showing that a specific accommodation would cause significant difficulty or expense